

1. Did claimant meet with personal injury by accident on September 13, 1999, and, if so, did that accidental injury arise out of her employment with respondent.

2. Is K.S.A. 44-501(e), commonly referred to as the “heart amendment” unconstitutional as a violation of the equal protection clause of the United States Constitution?

**Findings of Fact and Conclusions of Law**

The decedent, Debra Sue Mudd, worked as a nurse in the intensive care unit of the respondent hospital. On September 13, 1999, while running in response to a “code blue” claimant suffered a rupture of a cerebral aneurysm. She died September 23, 1999 as a result of that cerebral vascular hemorrhage.

In the Award, Judge Frobish said, in part:

As the parties stipulated to, there were nineteen Code Blues over a period of six months. Of those nineteen Code Blues, the Claimant responded to seven of those [including the one on September 13, 1999]. On a normal day to day basis, it was not usual for the Claimant to respond to Code Blues. The Claimant’s husband provided testimony that when the Claimant did have to respond to the Code Blues that her participation was a stressful event for her. The Court does not find that [sic] particularly relevant whether or not the Claimant ran or moved quickly for [a] short distance in responding to the Code Blue. The Court finds it more compelling that the Claimant did find the events stressful and that there would be a heightened sense of urgency and a release of adrenaline which would cause the Claimant’s blood pressure to become elevated which would be the precipitating factor causing the Claimant to suffer a cerebrovascular stroke at that time. Exertion in the context of this statute is not necessarily limited to physical exertion. To exert is to put forth or to put one’s self into action or to a tiring effort. This can be accomplished not only physically but mentally and emotionally. The mental and emotional exertion by the Claimant was not a daily occurrence in her work.

However, Judge Frobish concluded:

Considering the evidence before the Court relating to the nature of the Claimant’s employment as an ICU Nurse, her employment classification, the variety of tasks she performed, the Court can only conclude that the Claimant was acting within the course of her “usual work” and her “regular employment” when she suffered her cerebrovascular stroke. The Court must, therefore, deny the Claimant’s request for benefits under the Workers Compensation Act.

The Board disagrees. The exertion from running to respond to a code blue was something that occurred on average only once a month while decedent was on duty. Accordingly, the Board finds that running was an unusual activity for decedent and that the running constituted unusual exertion within the meaning of K.S.A. 44-501. In addition, the Board finds that decedent suffered heightened stress when responding to a code blue. This unusual stress in responding to the code blue on the date in question contributed to the unusual level of exertion and, in addition, constituted an external force within the meaning of the heart amendment. The Board finds that the stress, combined with the running, elevated decedent's blood pressure and, more likely than not, precipitated the rupture of the aneurysm while decedent was responding to the code blue.

The "heart amendment," to the Kansas Workers Compensation Act precludes coverage for cerebrovascular injury, except where the employee proves a causal connection between the injury and the employment, and, furthermore, either there was unusual exertion.<sup>1</sup> But the heart amendment does not apply where an external force was a causative factor. Therefore, in order for this claim to be compensable, claimant must prove that either unusual exertion or an external force or agency precipitated the decedent's subarachnoid hemorrhage. The work activity, however, need not be the sole cause of the cerebrovascular disease.<sup>2</sup>

In a prior case where the Board was called upon to interpret and apply the heart amendment the Board said:

In dicta, the Kansas Supreme Court in Dial v. C.V. Dome Co., 213 Kan. 262, 515 P.2d 1046 (1973), indicated that anxiety and stress could constitute external force and an exception to the heart amendment contained in K.S.A. 44-501. Starting on page 267 of that decision, the Court said:

"Yet another analogy might be that [of] a workman who is engaged in his customary duties, and putting forth only his customary exertion, when he is suddenly confronted by an armed assailant bent on robbery. If the workman succumbs to a physical attack his injuries are compensable. *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (shooting); *Phillips v. Kansas City, L. & W. Rly. Co.*, 126 Kan. 133, 267 Pac. 4 (beating); *Stark v. Wilson, Receiver.*, 114 Kan 459, 219 Pac. 507 (stabbing). But if the same workman has a weak heart which succumbs to the natural fear and anxiety

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<sup>1</sup> K.S.A. 1999 Supp. 44-501(e).

<sup>2</sup> See *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

engendered by the encounter, without physical trauma, are he or his dependents to be deprived of compensation merely because his *exertion* was not unusual? Again, we think not; in such a case his exertion has nothing to do with his injury. “We thus agree with the director’s conclusion; it was not the legislative intent that the amendment apply to this sort of case. Where the disability is the product of some external force or agency, and not of the exertion of the decedent’s work, the heart amendment has no applicability. In such a case where exertion is not the agency ‘necessary to precipitate the disability,’ the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of the workman’s employment.”

Although the Kansas Supreme Court had the opportunity to retract or limit that dicta three years later in the case of Suhl v. Volks Homes, Inc., 219 Kan. 800, 549 P.2d 944 (1976), it did not. Instead of pronouncing that emotional stress and anxiety could not constitute either an external force or an exception to the heart amendment contained in K.S.A. 44-501, in that case the Court merely held that the medical testimony failed to establish that the alleged emotional stress was the external force or agency which precipitated decedent’s heart attack. By implication, it appears the Court has determined that stress may constitute external force.

The Appeals Board agrees with the Administrative Law Judge’s conclusion that the medical evidence supports a conclusion that decedent’s infarction was precipitated by the unusual exertion caused by the long drive and the inordinate stress caused by the late night, business-related telephone conversation. Because decedent’s infarction was directly related to both unusual physical exertion and work-related anxiety, the Appeals Board finds that decedent’s myocardial infarction constitutes personal injury by accident arising out of and in the course of employment with respondent and that decedent is entitled to workers compensation benefits for that unfortunate event.<sup>3</sup>

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<sup>3</sup> *Hamrick v. Arabian Horse Express*, WCAB Docket No. 183,004 ( Feb. 1997). Affirmed by the Kansas Court of Appeals in an unpublished Memorandum Opinion filed August 7, 1998, Docket No. 78,510, wherein the Court said: Both the administrative law judge and the Board found the 14-hour drive to Kentucky constituted “unusual exertion.” And both found that receiving the news that the bank had foreclosed and the company’s magazines would not be shipped to be an “external force” which substantially contributed to

In this case, the medical evidence supports a finding that the running, together with the stress from responding to the code blue, contributed to the rupture of the aneurysm.

Ms. Mudd was responding to a Code Blue at the onset of her severe headache and initial loss of consciousness. Subarachnoid hemorrhage, frequently of catastrophic onset such as this, is frequently associated with severe head pain. Intracranial aneurysms are the most common cause of subarachnoid hemorrhage. Recurrent hemorrhage from the same site is characteristic of this syndrome. Rupture of an aneurysm typically occurs while the patient is engaged in some sustained exertional activity rather than while at rest.<sup>4</sup>

Q. (Mr. Short) Do you have an opinion within a reasonable degree of medical certainty, which means more likely than not, whether her activity and stress of running to respond to a code blue precipitated her stroke?

A. (Dr. Schwertfeger) It would be conditions that would be conducive to a subarachnoid hemorrhage in a patient predisposed to that.

Q. Let me hand you what has been marked as Exhibit 2 for your deposition. I believe that is a letter that you wrote to me about this case, is that true?

A. That is correct.

Q. In there I believe you say something to the effect that strokes like this more often happen with exertion than with inactivity, is that true?

A. Yes, it would be typical of this type of event to occur with activity.

Q. So would you say that it is more likely than not that the exertion of this lady running to respond to a code blue was a factor in precipitating her stroke?

A. It would be a factor I believe, yes.<sup>5</sup>

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appellee's heart attack. Our Supreme Court has clearly implied that where medical testimony establishes that emotional stress was an external force precipitating a heart attack, it is compensable. See *Dial v. C.V. Dome Co.*, 213 Kan. 262, 268, 515 P.2d 1046 (1973).

<sup>4</sup> Depo. of Ty L. Schwertfeger, M.D., Ex. 2, report dated 06/22/00, p. 3 (Oct. 6, 2000).

<sup>5</sup> Depo of Ty L. Schwertfeger, M.D., pp. 5-6 (Oct. 6, 2000).

Q. (Mr. Dorothy) I think you stated your opinion that the activity involved in the response was at least a factor in causing the rupture of the aneurysm?

A. Yes, I believe it would factor in.

Q. Are there any other factors that you can tell us that would have been factored in?

A. Not that I am aware of. I think, you know, initially her blood pressure was not – it was a little bit elevated when she came in. It wasn't excessively elevated to suspect that maybe that was the driving force.<sup>6</sup>

The Board is mindful that respondent's expert medical witness, Dr. Karl Pfuetze, offered certain opinions that contradicted those of Dr. Schwertfeger. But Dr. Pfuetze's opinions on causation were colored by factual assumptions that were not supported by the evidence. When asked to assume different facts, his opinions changed and became more consistent with those of Dr. Schwertfeger. The Board finds the opinions of Dr. Schwertfeger, who was one of claimant's treating physicians, to be the more persuasive. Accordingly, this claim is compensable.

As to claimant's challenge to the constitutionality of K.S.A. 44-501(e), it is noted that the issue is preserved should this matter be appealed.

### **Award**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish should be and is hereby reversed.

**AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF THE** claimants, Wayne Mudd, as surviving spouse, Erica Mudd and Conner Mudd, minor dependents, and against the respondent, Neosho Memorial Regional Medical Center and the insurance carrier, Kansas Health Care Service Corporation, for an accidental injury which occurred on September 13, 1999, and based on an average weekly wage of \$935.66, for compensation at the rate of \$383.00 per week from September 14, 1999.

Subject to the provisions below and K.S.A. 1999 Supp. 44-510b, one-half of the weekly compensation payments shall be paid to Wayne Mudd, the surviving spouse, and one-fourth to the conservator of Erica Mudd, a minor dependent, until she reaches 18 years of age and one-fourth to the conservator of Conner Mudd, a minor dependent, until

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<sup>6</sup> Depo of Ty L. Schwertfeger, M.D., p. 13 (Oct. 6, 2000).

he reaches 18 years of age. After that date, the minor dependents will continue to receive payment until he or she reaches twenty-three (23) years of age only if he or she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if she is physically or mentally unable to earn wages in any type of substantial or gainful employment, subject, of course, to the maximum amount of compensation payable, whereupon all rights to benefits terminate.

It is further provided, however, that from June 24, 2001, the date of remarriage of Wayne Mudd, the entire weekly payment is to be paid to the conservators of the minor dependents, or to the dependent when such dependent has reached the age of majority. In addition, the surviving spouse is entitled to a lump sum amount equivalent to 100 weeks of benefits.

Should benefits to one minor dependent cease, due to death, marriage or otherwise, the entire weekly payment that was otherwise payable to the minor dependent shall be made to the other dependent, if his or her right to benefits has not otherwise terminated.

For the period of September 13, 1999 to June 24, 2001, the date of re-marriage, Wayne Mudd is entitled to \$191.50 per week for 92.86 weeks, for a sum of \$17,782.69. In addition, he is entitled to \$191.50 per week for an additional 100 weeks or \$19,150 for a total of \$36,932.69 which is currently due and owing, less any amounts previously paid.

For the period of September 13, 1999 to June 24, 2001 there would be due and owing to the conservator of Erica Mudd 92.86 weeks at the rate of \$95.75 in the sum of \$8,891.35 and for the period of June 24, 2001 to May 18, 2002 she is entitled to 48.71 weeks at the rate of \$191.50 per week in the sum of \$9,327.97 for a total amount due and owing of \$18,219.32, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$191.50 per week subject to the provisions of K.S.A. 1999 Supp. 44-510b or further order of the Director.

For the period of September 13, 1999 to June 24, 2001 there would be due and owing to the conservator of Conner Mudd 92.86 weeks at the rate of \$95.75 in the sum of \$8,891.35 and for the period of June 24, 2001 to May 18, 2002 he is entitled to 48.71 weeks at the rate of \$191.50 per week in the sum of \$9,327.97 for a total amount due and owing of \$18,219.32, which is ordered paid in one lump sum less any amounts previously paid. Thereafter payments will continue at the rate of \$191.50 per week subject to the provisions of K.S.A. 1999 Supp. 44-510b or further order of the Director.

Notwithstanding language to the contrary, the maximum amount of compensation payable to decedent's dependents shall not exceed \$200,000 and when such total amount has been paid the liability of the employer for any further compensation under K.S.A. 1999 Supp. 44-510b to dependents, other than the minor dependents of the decedent, shall

cease, except that the payment of compensation to any minor dependent of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated and shall not be subject to termination until such child becomes 18 years of age.

The respondent and insurance carrier are ordered to pay or reimburse up to the maximum sum of \$5,000, for funeral expenses incurred.

The respondent and insurance carrier are ordered to pay or reimburse the reasonable and necessary medical expenses of decedent.

The attorney fee contract is approved insofar as it is not inconsistent with the provisions of the applicable version of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier and such are directed to pay costs of the transcripts as follows:

Karen Starkey, CSR	Unk.
Metropolitan Court Reporters	\$305.70
Ireland Court Reporters	\$124.52

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2002

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BOARD MEMBER

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BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director



